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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 CHASE HAYES,

12 Plaintiff,

14 v.

15 VONS RETAIL STORE,

17 Defendant.
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Case No. 3:14-cv-0268-GPC-BLM

ORDER:

**(1) GRANTING MOTION FOR
LEAVE TO PROCEED IN
FORMA PAUPERIS, (ECF NO. 2);**

**(2) SUA SPONTE DISMISSING
ACTION PURSUANT TO 28
U.S.C. § 1915(e)(2)(B);**

**(3) DENYING AS MOOT
MOTION TO APPOINT
COUNSEL, (ECF NO. 3)**

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20 Plaintiff, proceeding pro se, has filed a complaint for disability discrimination,
21 along with motions to proceed in forma pauperis and to appoint counsel. (ECF Nos.
22 1, 2, 3.)

23 All parties instituting any civil action, suit or proceeding in a district court of the
24 United States, except an application for writ of habeas corpus, must pay a filing fee of
25 \$350. See 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to
26 prepay the entire fee only if the plaintiff is granted leave to proceed in forma pauperis
27 pursuant to 28 U.S.C. § 1915(a). See Rodriguez v. Cook, 169 F.3d 1176, 1177 (9th
28 Cir. 1999).

1 Here, Plaintiff declares he has been unemployed since June 2012 and that his
2 current income consists only of \$675 per month in disability or workers compensation
3 funds. (ECF No. 2.) Plaintiff declares he has only \$50 in a checking account and that
4 his only other asset is a financed 2007 Toyota FJ Cruiser with an outstanding balance
5 of \$15,000. Based on this information, the Court finds Plaintiff has sufficiently
6 demonstrated his inability to pay the required filing fee. Accordingly, the Court will
7 grant Plaintiff's Motion for Leave to Proceed in Forma Pauperis.

8 Notwithstanding payment of any filing fee or portion thereof, a complaint filed
9 by any person seeking to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a)
10 is subject to a mandatory and sua sponte review and dismissal by the court to the extent
11 it "fail[s] to state a claim upon which relief may be granted." 28 U.S.C. §
12 1915(e)(2)(B); Calhoun v. Stahl, 254 F.3d 845, 845 (9th Cir. 2001) ("[T]he provisions
13 of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners."); Lopez v. Smith, 203 F.3d
14 1122, 1126-27 (9th Cir. 2000) (en banc). Section 1915 mandates that a court reviewing
15 a complaint filed pursuant to the in forma pauperis provisions of section 1915 make
16 and rule on its own motion to dismiss before directing that the complaint be served by
17 the U.S. Marshal pursuant to Federal Rule of Civil Procedures, Rule 4(c)(2). Lopez,
18 203 F.3d at 1127.

19 Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the complaint.
20 Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under
21 Rule 12(b)(6) where the complaint lacks a cognizable legal theory. Robertson v. Dean
22 Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984); see Neitzke v. Williams, 490
23 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis
24 of a dispositive issue of law."). Alternatively, a complaint may be dismissed where it
25 presents a cognizable legal theory yet fails to plead essential facts under that theory.
26 Robertson, 749 F.2d at 534. While a plaintiff need not give "detailed factual
27 allegations," he must plead sufficient facts that, if true, "raise a right to relief above the
28 speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007).

1 Here, the body of Plaintiff's Complaint states, in its entirety, "Plaintiff alleges:
2 Disability Discrimination." (ECF No. 1.) Attached to Plaintiff's Complaint is a
3 "Charge of Discrimination" that Plaintiff apparently submitted to the U.S. Equal
4 Employment Opportunity Commission (EEOC) and California's Department of Fair
5 Employment and Housing. Also attached to Plaintiff's Complaint is a "Dismissal and
6 Notice of Rights" from the EEOC, stating: "Your charge was not timely filed with the
7 EEOC; in other words, you waited too long after the date(s) of the alleged
8 discrimination to file your charge." While the foregoing documents were attached to
9 Plaintiff's Complaint, they were neither mentioned nor incorporated by reference into
10 the body of Plaintiff's Complaint. The Court may still, however, consider these
11 documents in determining whether Plaintiff has stated a claim. Durning v. First Boston
12 Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

13 Plaintiff asserts in the "Charge of Discrimination" that he believes Defendant
14 terminated his employment "due to [his] accident on June 20, 2012." Plaintiff alleges
15 he "had a[n] accident [on] June 20, 2012, which [he] reported to the store supervisor
16 Sun Chang on June 20, 2012 and [his] Union (BCTGM) on June 21, 2012 by mail to
17 cover [his] Weingarten Rights." Plaintiff alleges Vons terminated his employment on
18 June 27, 2012, "with a reason being [that he] failed [his] probationary period."
19 Plaintiff then goes on to describe how Defendant violated Plaintiff's Weingarten Rights
20 by questioning Plaintiff about his accident without a union representative present
21 despite Plaintiff's request that such a representative be present.

22 While Plaintiff alleges "disability discrimination," nowhere does Plaintiff assert
23 which anti-disability discrimination law Defendant allegedly violated. Indeed, the few
24 assertions contained in the "Charge of Discrimination" attached to Plaintiff's
25 Complaint refer to Plaintiff's Weingarten Rights. These rights, however, pertain to an
26 employee's right to have a union representative present at an investigatory interview
27 that the employee reasonably believes might result in disciplinary action. See NLRB
28 v. J. Weingarten, Inc., 420 U.S. 251 (1975). Thus, Plaintiff has failed to state a claim


1 for disability discrimination because Plaintiff has failed to (1) identify which anti-
2 disability discrimination law(s) forms the basis of his claims, and (2) plead sufficient
3 facts demonstrating Plaintiff is entitled to relief under that law(s). Accordingly, the
4 Court will dismiss Plaintiff's Complaint. The Court will, however, permit Plaintiff to
5 file an amended complaint to overcome these deficiencies.

6 Because the Court dismisses Plaintiff's Complaint, the Court will deny as moot
7 Plaintiff's Motion to Appoint Counsel at this time.

8 Based on the foregoing, **IT IS HEREBY ORDERED** that:

- 9 1. Plaintiff's Motion to Proceed in Forma Pauperis, (ECF No. 2), is
10 **GRANTED.**
- 11 2. Plaintiff's Complaint is **DISMISSED WITHOUT PREJUDICE.**
- 12 3. Plaintiff is granted leave to file an **AMENDED COMPLAINT.** If
13 Plaintiff wishes to file an amended complaint, he shall do so on or before
14 **March 21, 2014.** Plaintiff is advised that any amended complaint must
15 be complete in itself, including any attachments, without reference to the
16 original complaint. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir.
17 1987). If Plaintiff fails to file an amended complaint on or before March
18 21, 2014, this action shall remain dismissed without further order by the
19 Court.
- 20 4. Plaintiff's Motion to Appoint Counsel, (ECF No. 3), is **DENIED AS**
21 **MOOT.**

22 DATED: February 19, 2014

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24 HON. GONZALO P. CURIEL
25 United States District Judge
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